

In the Matter of Elbert Walker

DOP Docket No. 2004-2920

(Merit System Board, decided August 11, 2004)

Elbert Walker, represented by Arnold Shep Cohen, Esq., petitions the Merit System Board (Board) for restoration of prior service in order for his personnel record to reflect continuous service for future layoff purposes.

Department of Personnel (DOP) records reflect that the petitioner received a permanent appointment as a Parking Enforcement Officer with the Department of Administration/Public Safety, Town of Morristown, effective October 28, 1991. He remained employed with the appointing authority until August 10, 1995, when he was removed on charges of gross malfeasance, abuse of process, and conduct unbecoming a public employee. The petitioner appealed his removal to the Board and was granted a hearing at the Office of Administrative Law, where he settled his removal to a 90-day suspension on May 7, 1997. On June 24, 1997, the Board acknowledged the settlement between the parties, which provided in pertinent part that the petitioner's removal be modified to a 90-day suspension; the period after the suspension through May 31, 1997 be deemed a leave of absence without pay; an "offer of employment" be provided to the petitioner as a Laborer, effective June 1, 1997, with the Department of Public Works, Town of Morristown, subject to his successfully passing a physical examination; and the employment record of the petitioner would reflect the disciplinary record of the then current matter. *See In the Matter of Elbert Walker* (MSB, decided June 24, 1997). A copy of that decision is attached. It is noted that the title of Laborer is noncompetitive and considered an unrelated lower title to Parking Enforcement Officer, which is a competitive title. Additionally, there is nothing in the record to indicate that the petitioner failed to complete his working test period in the title of Laborer. It is further noted that DOP records indicate that the petitioner was promoted to Truck Driver effective February 21, 2000.

The petitioner asserts that the appointing authority has incorrectly used the date of June 1, 1997 as the date of his appointment and refuses to acknowledge his prior service in calculating his seniority for future layoff purposes. Thus, he claims that the appointing authority is in violation of the settlement agreement. In response, the appointing authority, represented by Joseph Maddaloni, Jr., Esq., maintains that it has complied with the express terms of the settlement agreement. However, it indicates that the agreement is silent as to the treatment of the petitioner's seniority. Therefore, it requests that the Board decide the narrow issue of whether the petitioner's prior service with the appointing authority should be calculated in his seniority for future layoff purposes.

CONCLUSION

N.J.A.C. 4A:8-2.4(a) provides that seniority for purposes of a layoff, except for police and fire titles, is the amount of continuous permanent service in the jurisdiction, regardless of title. Further, *N.J.A.C.* 4A:8-2.4(e) states that suspensions, other leaves of absence without pay,¹ and any period an employee is laid off shall be deducted in calculating seniority. Additionally, *N.J.A.C.* 4A:4-7.1(a) states that a permanent transfer is the movement of a permanent employee between organizational units within the same governmental jurisdiction. In local service, an organizational unit shall mean a department or separate agency within the same county or municipality. See *N.J.A.C.* 4A:4-7.1(a)2. Further, *N.J.A.C.* 4A:4-7.1(b)1 provides that the transferred employee shall retain permanent status in the previously held permanent title with the recipient organizational unit until examination and working test period procedures are concluded.

Additionally, *N.J.A.C.* 4A:4-7.8(a) provides that in local service that a voluntary demotion is the voluntary movement of a permanent employee from his or her permanent title to a lower title within the same organizational unit. *N.J.A.C.* 4A:4-7.8(b) states that permanent status and seniority shall be retained when the demotion is to a lower related title. *N.J.A.C.* 4A:4-7.8(c) provides that if the criteria in *N.J.A.C.* 4A:4-7.8(b) are not met, then the employee shall be appointed pending examination and satisfactory completion of the working test period.

In the instant matter, the settlement agreement entered into by the parties is silent as to the calculation of the petitioner's seniority. However, the settlement agreement clearly provides that the period of time after the petitioner's 90-day suspension would be recorded as a *leave of absence* without pay. Based on this language, the only reasonable interpretation is that the petitioner was allowed to continue his permanent service with the Town of Morristown. The agreement did not specify that the petitioner would resign his position of Parking Enforcement Officer. Further, the fact that the Town of Morristown offered the petitioner a position as a Laborer, which he later accepted, did not constitute a break in the petitioner's service. In this regard, it noted that suspensions and leaves of absence without pay are only *deducted* from seniority for layoff purposes, pursuant to *N.J.A.C.* 4A:8-2.4(e). Such periods of time, however, do not constitute a break in service, and the employee is entitled to aggregate the periods of permanent service before and after such periods of time in calculating "continuous permanent service" under *N.J.A.C.* 4A:8-2.4(a).

¹ It is noted that leaves without pay for military, educational, gubernatorial appointment, unclassified appointment, personal sick, disability, family, furlough extension and voluntary alternative to layoff shall not be deducted from seniority. See *N.J.A.C.* 4A:8-2.4(d)3.

In accepting the title of Laborer, the petitioner in effect took a voluntary demotion and transfer from the Department of Administration/Public Safety to the Department of Public Works after the agreed upon leave of absence without pay, which are permissible under Merit System rules. The petitioner has also retained his permanent status and his accumulated seniority in his new title. In order to have done this, the petitioner had to be examined and satisfactorily completed a working test period per the applicable regulations. *See N.J.A.C. 4A:4-7.1(b)1 and N.J.A.C. 4A:4-7.8(b)*. However, since the title of Laborer is in the noncompetitive division, an examination is not required. Further, there is nothing in the record to suggest that the petitioner failed to complete his working test period in the title of Laborer. Therefore, the petitioner satisfied the requirements to retain his permanent status and seniority. However, petitioner's 90-day suspension and leave of absence without pay should be deducted in calculating his seniority. Thus, the petitioner's seniority runs from October 28, 1991, the date he received his permanent appointment to the present time, less his 90-day suspension and leave of absence without pay.

ORDER

Therefore, it is ordered that Elbert Walker's petition be granted and the Town of Morristown adjust its records to reflect October 28, 1991 as the petitioner's permanent appointment date. It is further ordered that the petitioner's seniority for future layoff purposes run from October 28, 1991 to the date of an actual layoff, less any applicable deductions, including the petitioner's 90-day suspension and leave of absence without pay.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.